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No. 81-2103

In the Supreme Court of the United States

OCTOBER TERM, 1981

PENNCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly found that petitioner unlawfully withdrew recognition from a union without having sufficient evidence to support a reasonable and good faith belief that the union no longer represented a majority of petitioner's employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-23) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 25-39) are reported at 242 N.L.R.B. 467. The Board's supplemental decision and order (Pet. App. 40-48) are reported at 250 N.L.R.B. 716.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1982. A timely petition for rehearing was denied on April 8, 1982 (Pet. App. 24). The petition for a writ of certiorari was filed on May 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 49-50.

STATEMENT

1. Communications Workers of America, AFL-CIO ("the Union") was certified on November 1, 1976, as the bargaining representative of petitioner's production and maintenance employees after winning a Board election by a vote of 114 to 62 (Pet. App. 19-20). Between December 1976 and September 1977 the parties held 12 bargaining sessions, but were unable to reach agreement on a contract (*id.* at 20, 28). Meanwhile, on May 18, 1977, the Union began an economic strike and picketed petitioner's plant. Of the 173 employees in the bargaining unit, 109 failed to report to work at the commencement of the strike. Because of incidents on the picket line, a local court issued a restraining order in July 1977. (*Id.* at 20.)

In early November 1977, just over a year after the Union's certification, petitioner refused to negotiate further with the Union, contending that it had a good faith doubt of the Union's majority status (*ibid.*; *id.* at 28). At that time, there were 257 employees working within the bargaining unit, all but 47 of whom were hired after the strike began. All of the 109 striking employees were still on strike and had been replaced (*id.* at 20; 41-42).

The strike continued until September 15, 1978, when the Union removed its pickets and 42 employees offered unconditionally to return to work. At no time did the Union abandon the bargaining unit or relinquish its interest in negotiating a contract on behalf of the unit employees. (*Id.* at 20, 29.)

2. The Board found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from the Union without having sufficient objective evidence to support a good faith doubt of the Union's majority status.[1] The Board noted that new employees are presumed to support the union in the same ratio as those whom they have replaced, that the fact that an employee crosses a picket line and works during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative, and that petitioner had offered no evidence that any of the employees who crossed the picket line did not, in fact, support the Union. (*Id.* at 31-33, 42-48.) The Board further found that the unlawful withdrawal of recognition converted the economic strike into an unfair labor practice strike (*id.* at 32).

3. The court of appeals enforced the Board's order. Noting that petitioner's doubt as to the Union's majority status was based solely on its view that employees who crossed a picket line marred by violence should be presumed not to support the union, the court found that, under the stipulated facts, this presumption was not justified. The picket line violence had ended three and a half months earlier, and the record did not show how many of the employees working when recognition was withdrawn had been working at the time of the violence.[2] Moreover, since fewer than half of the 257 employees working at the time recognition was withdrawn would have to be fired to make room for the

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[1] The Board also found that petitioner violated Section 8(a)(5) and (1) by refusing to supply the Union with a copy of one of its health insurance plans (Pet. App. 32). Petitioner concedes (Pet. 5 n.6) that this finding is proper if the finding that the withdrawal of recognition was unlawful is upheld.

[2] The court left "to another day the case where picket line violence occurs close to the day of withdrawal" of recognition (*id.* at 22).

returning strikers, and since there was no indication that any of the working employees knew that they would lose their jobs if the strikers returned, it could not be presumed that those employees would oppose the Union in order to protect their jobs. Accordingly, the court concluded that petitioner had not produced sufficient objective evidence of doubt as to the Union's majority status to shift the burden to the Board to prove that the Union actually had majority status. (Pet. App. 22-23.)

ARGUMENT

1. Petitioner does not challenge the settled principle that the presumption that a certified union represents a majority of the unit employees—irrebutable for one year after certification (*Brooks* v. *NLRB*, 348 U.S. 96, 98-102, 104 (1954))—continues thereafter unless it is rebutted by objective evidence of a reasonable and good faith doubt that the union has maintained its majority status. See, *e.g.*, *NLRB* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (5th Cir. 1966); *NLRB* v. *Rish Equipment Co.*, 407 F. 2d 1098, 1101 (4th Cir. 1969); *Pioneer Inn Associates* v. *NLRB*, 578 F. 2d 835, 839 (9th Cir. 1978).[3] Petitioner introduced no evidence that any of the 366 unit employees—strikers, non-striking employees, striker replacements, or other newly hired employees (see note 8, *infra*)—had indicated opposition to the Union prior to the withdrawal of recognition. Petitioner

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[3]Petitioner relies (Pet. 11-12) on language in *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959), as suggesting that the employer should not be required to prove lack of majority status because proof of such status is peculiarly within the competence of the union. However, *Stoner Rubber* expressly holds that the burden shifts to the General Counsel to prove the union's majority status only when the employer overcomes the presumption of majority by producing sufficient evidence to raise a serious doubt of the union's continued majority status (*ibid.*). The Board and the court of appeals found in this case that such evidence had not been produced.

contends, however, that the fact that its striker replacements and non-striking employees crossed a picket line at which violence occurred, in order to go to work, supplied the requisite basis for doubting the Union's majority status. The holding of the Board and the court of appeals that, in the circumstances of this case, these factors were insufficient to sustain petitioner's burden of establishing a reasonable good faith doubt as to the Union's continued majority status presents no issue warranting review by this Court.[4]

The courts have held that an employee's failure to join a strike, or his return to work while the strike is still in progress, is insufficient, standing alone, to show the employee's opposition to the union. *NLRB* v. *Windham Community Memorial Hospital*, 577 F. 2d 805, 814 (2d Cir. 1978); *Rogers Manufacturing Co.* v. *NLRB*, 486 F. 2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974); *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F. 2d 380, 394 (D.C. Cir. 1972); *NLRB* v. *Frick Co.*, 423 F. 2d 1327, 1333-1334 (3rd Cir. 1970); *Komatz Construction, Inc.* v. *NLRB*, 458 F. 2d 317, 322 (8th Cir. 1972). Absent evidence to the contrary, crossing the picket line is as consistent with opposition to the particular strike, or with having to work for financial reasons, as with opposition to

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[4]Petitioner also contends (Pet. 9, 11) that the court of appeals departed from its own prior decisions. Even if this were true, such an intra-circuit conflict would not warrant review by this court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, the two prior Sixth Circuit cases relied on by petitioner are clearly distinguishable. In *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 270 n.6 (1974), the employer's refusal to bargain was held justified by the fact that a decertification petition had been filed and that the employer was informed that a majority of the employees supported the petition. In *NLRB* v. *Triplett Corp.*, 619 F. 2d 586, 587 (1980), withdrawal of recognition was based on a number of objective considerations, including the resignation of many employees from the union.

the union. *Allied Industrial Workers, Local 289* v. *NLRB*, 476 F. 2d 868, 881 (D.C. Cir. 1973).

2. Nor is a different conclusion required by the cases relied on by petitioner (Pet. 10, 15-17), which hold that striker replacements stand on a different footing from other employees who cross a picket line, because their jobs would be lost if the union prevailed and the strikers returned. These cases are factually distinguishable from the situation here.

In *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203, 1205-1206 (8th Cir. 1979) (Pet. 10, 15-16), the entire ten-person workforce was replaced by permanent replacements who crossed the striking employees' picket line to get to work. Similarly, in *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1110 (1st Cir. 1981) (Pet. 17), the replacements outnumbered the striking employees.[5] And in *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F. 2d 720, 728-729 (5th Cir. 1978) (Pet. 15, 16-17), a majority of the workforce at the time the employer expressed a doubt of the union's majority consisted of permanent replacements and strikers who had returned to work, and there was specific evidence of employee defections from the union.[6] Even if the presumption of majority status is rebutted where striker replacements constitute a majority of the

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[5]Moreover, in *Soule*, there was independent evidence that the replacements did not want to be represented by the union; "the great majority of the replacements testified that they in fact wanted nothing to do with [the union] and preferred a nonunion shop" (652 F. 2d at 1111).

[6]The court noted that "[t]he Company had received copies of Union resignation letters from 19 returning strikers and had received information that other reinstatements had also resigned from the Union" (584 F. 2d at 728 (footnote omitted)). In addition, "the Company had been informed by a Union representative that '50 to 25 or 20%' of the strikers would not be returning to work" (*ibid.*).

bargaining unit, it does not follow that the same conclusion is warranted where, as here, the replacements constituted only a minority of the unit employees.[7]

Here, when petitioner withdrew recognition from the Union, the bargaining unit consisted of 366 employees,[8] of whom, at most, 109 were striker replacements. Even if it be assumed that all the replacements opposed the Union, they were only 30 percent of the unit employees. Under settled principles, such a percentage is insufficient to establish a reasonable doubt as to the Union's majority status. See *Cain's Generator & Armature Co. Inc.*, 237 N.L.R.B. 1198, 1201 (1978), enforced, 628 F. 2d 933 (6th Cir. 1980) (expressions of opposition to union by 9 of 23 unit employees insufficient); *Dy-Dee Wash, Inc.*, 228 N.L.R.B. 389, 390 (1977) (expressions of dissatisfaction by 2 or 3 of 7 unit employees insufficient); *San Luis Obispo County Restaurant and Tavern Association*, 196 N.L.R.B. 1082, 1087 (1972) (anti-union petitions signed by 94 of 304 unit employees insufficient).

Finally, the court of appeals correctly concluded that the picket line violence which occurred here did not furnish petitioner a valid basis for doubting the Union's continued majority status. As the court noted (Pet. App. 22), the violence cited by petitioner occurred early in the strike and ended three and a half months before the withdrawal of

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[7] Indeed, where replacements were less than half the bargaining unit, the First Circuit has found a withdrawal of recognition unlawful. *NLRB* v. *Crimptex, Inc.*, 517 F. 2d 501, 505 (1975).

[8] For the purpose of determining the Union's continued majority status, the strikers, even though replaced, must be considered part of the bargaining unit. *C.H. Guenther & Son, Inc.* v. *NLRB*, 427 F. 2d 983, 987 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *NLRB* v. *Crimptex, Inc.*, *supra*, 517 F. 2d at 503; *NLRB* v. *Windham Community Memorial Hospital*, *supra*, 577 F. 2d at 813.

recognition. Moreover, the record does not show how many employees working when recognition was withdrawn had crossed the picket line during the violence.

3. Contrary to petitioner's contention (Pet. 10, 13), the Board's position does not mean that employees whose interests are opposed to those of the strikers are locked into representation by a union which does not represent their interests. If replacements and nonstriking employees wish to oust the incumbent union, they are free to file a decertification petition. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969). The court below has held that a decertification petition signed by a majority of the unit employees may justify a refusal to bargain. See *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 270 n.6 (6th Cir. 1974). Here, however, no decertification petition was filed, and there is no evidence that any employees, let alone a majority, indicated to petitioner that they opposed the Union. Thus, to the extent that petitioner is relying on the right of its employees to reject representation, it is relying on a right which no employee has asserted. Under these circumstances, as this Court has observed, "[t]o allow employers to rely on employees' rights in refusing to bargain with the [certified] union is not conducive to [industrial peace], it is inimical to it." *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

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